14

Office - Supreme Court, U. S.
FILED
OCT 9 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1952

No. 385

WESTERN NEW YORK WATER COMPANY and NEW YORK WATER SERVICE CORPORATION,
Petitioners,

against

ERIE COUNTY WATER AUTHORITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

REID S. MOULE,
662 Ellicott Square Building,
Buffalo, New York,

and

JESSE CLIMENKO,
30 Broad Street,
New York, New York,
Attorneys for Petitioners.

JULIUS L. SACKMAN,
New York, N. Y.,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

	PAGE
Appendix	31
Argument	18
Conclusion	30
Jurisdictional Statement	2
Opinion Below	2, 31
Petition	1
Question Presented	4
Reasons for Granting the Writ	10
Statement of the Case	5
Summary of the Argument	17

CITATIONS.

Cases:

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, (1930), 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451	27
Brown v. Miller, (C. C. A.-D. C., 1923), 286 Fed. 994	25
Dartmouth College v. Woodward, 9 Wheat. 518, 4 L. Ed. 629	15
Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616	15
Erie County Water Authority v. Western New York Water Co., (1952), 303 N. Y. 908, 105 N. E. 2d 494	9
Erie County Water Authority v. Western New York Water Co., (1952), 304 N. Y. 342, 107 N. E. 2d 479	2, 31
Hepp v. Petrie, (1924), 185 Wis. 350, 200 N. W. 857	10
Herman v. Acheson, (Dist. Ct., D. C.-No. 3772-1952)	12
Joint Anti-Fascist Refugee Com. v. McGrath, (1951), 341 U. S. 123, 95 L. Ed. 817, 71 S. Ct. 624	29
Leviten v. Sandbank, (1943), 291 N. Y. 352, 52 N. E. 2d 898	25

Lisenba v. California, (1941), 314 U. S. 219, 86 L. Ed. 166, 62 S. Ct. 280 15

Matter of H, an attorney, (1882), 87 N. Y. 521..... 25

Northwestern Indiana Telephone Co., Re, (1930), 201 Ind. 667, 171 N. E. 65, PUR 1930 D 143..... 22

Ohio Bell Teleph. Co. v. Public Utilities Comm., (1937), 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.. 28

Packer v. Rapaport, (1949), 88 N. Y. S. 2d 118, reversed on other grounds 275 App. Div. 820, 89 N. Y. S. 2d 703 25

People v. Defore, (1926), 242 N. Y. 13, 150 N. E. 585.. 3

Porter, Price Administrator v. Huber, (1946), 68 F. Supp. 132 .....20, 25

Public Service Commission v. New York & Richmond Gas Co., (1935), 244 App. Div. 398, 279, N. Y. Supp. 824 23

Roberts v. Anderson, (C. C. A. 10, 1933), 66 F. 2d 874.. 28

Shepherd v. Florida, (1951), 341 U. S. 50, 95 L. Ed. 740, 71 S. Ct. 549 16

State ex rel. Hoel v. Brown, 105 Ohio St. 479, 138 N. E. 230 15

Watson v. Watson, (1939), 171 Misc. (N. Y.) 175, 11 N. Y. S. 2d 537 25

Opinions:

Opinions of the Committee on Professional Ethics and Grievances of the American Bar Association:

Opinion 37, dated May 4, 1931 20

Opinion 134, dated March 15, 1935 19

Statutes and Canons:

Canons of Professional Ethics of the American Bar Association, Canon 36 .....5, 8, 10, 16, 17, 18, 19, 27

Judiciary Law of State of New York

Section 90 .....25, 26

Pages 764 *et seq.* of McKinney. (Canons of Ethics) 17, 18

PAGE

Public Service Law of the State of New York
Section 5, Subdivision 5a 6
Section 15 .....5, 8, 10, 16, 17, 20, 22, 27
Section 89-c 8
United States Code, Judiciary and Judicial Procedure
Section 1257, Subdivision (3) 2
Section 2101, Subdivision (c) 2

Texts and Miscellaneous:

Corpus Juris Secundum (Vol. 7, pp. 730 and 827).... 25
H. R. 405, 1st Session of 82nd Congress, Jan. 3, 1951.. 13
New York World Telegram and Sun, Sept. 4, 1952... 13
1951 Annual Report of Public Service Commission of State of New York (p. 120) 23
Wigmore on Evidence, (3rd Ed.), Section 2377.....21-22

IN THE

Supreme Court of the United States

October Term, 1952

No. .....

WESTERN NEW YORK WATER COMPANY and NEW YORK WATER SERVICE CORPORATION,
Petitioners,

against

ERIE COUNTY WATER AUTHORITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

To the Honorable the Supreme Court of the United States:

Petitioners, Western New York Water Company and New York Water Service Corporation, the defendants-appellants below, pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered July 15, 1952.

I

Opinion Below

Erie County Water Authority v. Western New York Water Company, et al., 304 N. Y. 342 [107 N. E. (2d) 479, New York Law Journal, August 29, 1952, Front Page, Vol. 128-No. 43. (See appendix herein, pp. 31-43)]

II

Jurisdictional Statement

The judgment of the Court of Appeals of the State of New York was entered on July 15, 1952 (R. 69-70). The judgment to be reviewed is a final judgment rendered by the highest court of the State of New York in which a decision could be had.

This Court's jurisdiction is invoked under Title 28, United States Code, Judiciary and Judicial Procedure, Section 1257, Subdivision (3), and Section 2101, Subdivision (c).

The federal question determinative of this case (due process of law, under the Fourteenth Amendment to the Constitution of the United States) was raised at the earliest opportunity in this proceeding when, on the return date of the condemnation petition, counsel for the petitioners moved to bar Laurence J. Olmsted from appearing in this case as special counsel for the respondent herein on the ground that his participation in the case constituted a violation of the principle of "fair play in litigation" (R. 23, 38). This objection was urged on the New York Court of Appeals, the prevailing opinion stating that counsel for the defendant companies charged Olmsted with "conduct that was *prejudicial to the administration of justice.*" (Emphasis added). The denial by the Court of Appeals of petitioners'

motion to bar Olmsted on the ground that the County Court did not have jurisdiction of the matter was a rejection of the contention of the petitioners with respect to the federal question which was raised. The basis of the decision of the Court of Appeals, in asserting lack of jurisdiction on the part of the County Court on the ground that the Appellate Division of the Supreme Court "has exclusive jurisdiction to say what constitutes professional misconduct on their (an attorney's) part" and that the "punishment" must be determined by that court, is completely inadequate since it was not sought to discipline Olmsted, but merely to invoke the inherent jurisdiction of a court to regulate the activities of its officers and to disqualify an attorney from appearing in a particular proceeding where the participation of such attorney therein is inimical to the proper conduct of the litigation and is prejudicial to the administration of justice. The inadequacy of the disposition of the matter by the Court of Appeals becomes apparent when consideration is given to the fact that once Olmsted participates in the trial of this proceeding and once his privileged and confidential information has been utilized the petitioners will have been irretrievably damaged. The mere fact that the ultimate judgment may subsequently be set aside on the ground that the petitioners' rights to a fair trial were thereby violated or that they were thereby deprived of their constitutional rights to due process of law cannot possibly undo the unfairness which would already have resulted. In this connection it is pertinent to observe that in New York the common law rule is observed that the admissibility of evidence is not affected by the illegality of the means by which it was obtained. *(People v. Defore,* (1926) 242 N. Y. 13, 150 N. E. 585.)

III

Question Presented

The question presented is this:

An attorney at law, in the exercise of a statutory right conferred on him as attorney for the Public Service Commission of the State of New York, examined and investigated the business and affairs, and inspected the books and records, of a Company subject to the jurisdiction of the Commission, thereby acquiring confidential, privileged and unpublished information concerning the Company's business, property and affairs. Thereafter, while still so employed by the Commission, and although he had no experience in condemnation work, the attorney was invited by a local governmental agency—Erie County Water Authority—to act as Special Counsel for it in a proceeding to be instituted in the County Court of Erie County, New York, to condemn property of the Company, in which proceeding such confidential, privileged and unpublished information would be relevant and material to the issue. An application by the attorney to the Public Service Commission for a leave of absence to act for the County Authority in such proceeding having been denied, and an application by the Authority to the Public Service Commission for leave to examine its confidential records concerning the Company having been denied, the attorney resigned his position with the Commission and one hour later, on the same day, received, accepted and commenced to act under, a retainer from the Authority to represent it in said condemnation proceeding. In other words, having failed to obtain such information by direct methods, the Authority proceeded by the indirect method of hiring the repository of such information in the person of such attorney. When the case was called for trial, counsel for the Company urged

that the Special Counsel was disqualified by reason of his aforesaid prior activities, and objected to his participation in the proceeding.

The question is: Was the refusal by the New York Court to disqualify the attorney from appearing in the cause a denial of due process?

In resolving this question it is pertinent to observe that the Canons of Professional Ethics of the American Bar Association and the applicable provision of the New York statute (Section 15 of the Public Service Law) are but specific codifications declaratory of the principle of due process of law. With this in mind, it is apparent that a violation of Canon 36, a violation of said Section 15, the allowance of conduct prejudicial to the administration of justice, the deprivation of petitioners' rights to a fair trial and to fair play in litigation, are evidence of the deprivation of the pettioners' constitutional rights respecting due process of law.

IV

Statement of the Case

This is a proceeding in condemnation which was instituted by the Erie County Water Authority ("Authority") to acquire the plant and properties of the Western New York Water Company ("Company".)

Laurence J. Olmsted, a former attorney for the Public Service Commission, was retained in this proceeding by the Authority as special counsel.

At a preliminary hearing in the County Court of Erie County (the court of original jurisdiction herein) a motion was made by the Company to bar the appearance of the said Laurence J. Olmsted as such special counsel for the plaintiff in this condemnation proceeding on the ground

that Olmsted was disqualified to act as counsel for the Authority in the proceeding because of confidential, privileged and unpublished information theretofore disclosed to him by the Company, in his capacity of attorney for the Public Service Commission, as required by statute. The motion was orally made and no motion papers were ever served. Hearings were thereafter held in the County Court of Erie County. The said County Court, by order dated September 7, 1951, denied the petitioners' motion; said order was subsequently affirmed by order of the Appellate Division of the Supreme Court of the State of New York, Fourth Department, dated October 30, 1951, entered November 16, 1951, one justice dissenting, on the ground that the Erie County Court had no jurisdiction to grant the relief sought, (R. 65, 66). The said order of the Appellate Division was, in turn, affirmed upon the same ground by the Court of Appeals of the State of New York on July 15, 1952, three of the seven judges dissenting, (R. 69-70).

The Company for a number of years has been and is now subject to the jurisdiction of the Public Service Commission of the State of New York. (Public Service Law of the State of New York, Section 5, Subdivision 5a.) Pursuant to such jurisdiction the Public Service Commission and its employees have frequently investigated and passed upon many matters affecting the Company. Among the matters investigated and passed upon were the adequacy of the Company's facilities and service, which is acknowledged by respondent to be an issue in this proceeding (R. 55). Olmsted played a leading role, as Commission Counsel, among the Public Service Commission employees who investigated and passed upon the adequacy of the Company's facilities and service.

Olmsted was employed by the Public Service Commission as Principal Attorney and Assistant Counsel from 1935

until his resignation became effective on May 16, 1951 at 12:00 o'clock noon (R. 40-41, 45). At 1:00 P. M. of that same day he commenced his employment by, and formal association with, the Authority (R. 42). Olmsted's negotiations with the Authority with a view to employment in this case began in February, 1951, while Olmsted was still in the employ of the Commission and appearing as its attorney in matters affecting the Company (R. 59).

During his employment negotiations with the Authority Olmsted continued to act as Commission Attorney in hearings involving the Company, despite the manifest impropriety of such action, until relieved by the Commission from such assignments, after the Commission discovered the circumstances (R. 59).

An application was made by Olmsted to the Public Service Commission for a leave of absence to act for the Authority in this proceeding and such application was denied (R. 50, 51, 57). An application was also made by the Authority to the Public Service Commission for leave to examine its confidential records concerning the Company and this application, too, was denied (R. 53, Petitioners' Ex. 3).

The Company contended that the Authority employed Olmsted as its counsel in order to obtain the benefits which he represented would accrue to the Authority in the condemnation proceeding by reason of the special knowledge and privileged information concerning the Company which Olmsted acquired while in the employ of the Public Service Commission, working on Company matters. This is apparent inasmuch as Olmsted has had no special experience in condemnation. Olmsted literally has not had *any* condemnation experience (R. 40, 42, 59-61), the false recital in his contract of employment to the contrary notwithstand-

ing. The Company contended, further, that the retention of Olmsted as special counsel by the Authority constituted a violation of Canon 36 of the Canons of Professional Ethics of the American Bar Association (R. 16, 22, 43) and of Section 15 of the Public Service Law of the State of New York (R. 15), the net effect of which was to deprive the Company of the benefit of the due process of law, which is guaranteed to it by the Fourteenth Amendment to the Constitution of the United States, in that the allowance of such violations is destructive of the principle of "fair play in litigation" (R. 23, 38) and in that Olmsted's participation in the case deprived the petitioners of their right to a fair trial. Such violations were more directly evidence of a deprivation of due process in that said Canon 36 and said Section 15 are statutory codifications declaratory of the constitutional right of due process.

Olmsted contended that all the information he possesses is a matter of public record (R. 45-46). This was denied by the Company. The County Court refused to permit Olmsted to be called as a witness or to be cross examined (R. 28, 43-44, 61). Petitioners cite Olmsted's conferences with Company representatives, (R. 32, 37, 38, 47), inspection of confidential Company records at the office of the Company (R. 25, 32, 36), inspection of the Company's plant and facilities pursuant to Section 89-c of the Public Service Law, (R. 54), and recourse to other sources, including Commission Staff studies and data not available to the public or to the Authority, all during the extensive period of Olmsted's employment by the Public Service Commission, acting as its attorney in Company matters.

Olmsted challenged the jurisdiction of the County Court with respect to the Company's motion to bar him from the proceeding. The Court held that it had authority to pass upon the merits of the motion, and denied it.

The Appellate Division of the Supreme Court affirmed the order of the Erie County Court on the sole ground that the lower court had no jurisdiction to grant the relief sought. The Appellate Division did not pass upon the merits of the propriety of Olmsted's appearance.

An appeal was thereafter had to the Court of Appeals of the State of New York. A motion was made by the Authority to dismiss the appeal on the ground that the order appealed from was not a final order. This motion was denied by the Court of Appeals *(Erie County Water Authority v. Western New York Water Company, et al.*, (1952) 303 N. Y. 908, 105 N. E. 2d 494).

Subsequently the Court of Appeals of the State of New York affirmed the order of the Appellate Division on the sole ground that the County Court had no jurisdiction to grant the relief sought, specifically alluding to, but not passing upon, the contention of the petitioners that the appearance of Olmsted as special counsel for the Authority was (in the words of Chief Judge Loughran) "prejudicial to the administration of justice." (See Appendix herein, p. 34.)

The dissenting opinion in the Court of Appeals (by Conway, J.; concurred in by Desmond and Dye, JJ.) (Appendix herein pp. 35-43) held that the disqualification of an attorney in a particular matter is not disciplinary in character, that "the distinction between a formal disciplinary proceeding and the action of a court in the exercise of its inherent authority to regulate the activities of its officers and to forbid the appearance of an attorney in an action pending before a court of record has been recognized," that once the condemnation proceeding goes to trial the petitioners "may lose their right to a fair trial" and "Hence, the only proper way to insure a fair trial may be to disqualify an attorney with special and privileged informa-

tion obtained through sanction of a statute while representing another client", and that the "disqualification of an attorney in a particular proceeding has to do with the proper conduct of litigation before the court and is a matter over which the court has inherent power."

V

Reasons for Granting the Writ

The rights, privileges and immunities claimed by the petitioners herein are enshrined in the Fourteenth Amendment to the Constitution of the United States.

The appearance of Olmsted as special counsel for the Authority constitutes a violation of Canon 36 of the Canons of Professional Ethics of the American Bar Association and a violation of Section 15 of the Public Service Law of the State of New York, evidencing a deprivation of due process. Both said canon and section are codifications declaratory of the constitutional provision relating to due process of law. That such has been the attitude of the courts to legislation and rules governing the conduct of attorneys is well expressed in the case of *Hepp v. Petrie*, (1924) 185 Wis. 350, 355, 200 N. W. 857, 859, wherein the Supreme Court of Wisconsin said:

> "Such authority as these canons have is derived, not from the fact that they are approved by the American Bar Association, but because they are statements of principles and rules accepted and acknowledged by reputable attorneys wherever the common law of England obtains, and are recognized and applied by courts in proper cases."

Upon such facts the petitioners herein do not seek to discipline Olmsted. They seek neither censure, suspension nor disbarment. They seek merely the disqualification of

Olmsted in this particular matter. This point is clearly set forth in the dissenting opinion in the Court of Appeals by Conway, J. (See Appendix herein, pp. 35-43).

Counsel for the petitioners has contended that the participation of Olmsted in this matter is incompatible with "fair play in litigation." The prevailing opinion of the Court of Appeals admits that Olmsted has been charged with "conduct that was prejudicial to the administration of justice." And Judge Conway, in the dissenting opinion referred to above, has said:

> "Once the condemnation proceeding goes to trial the appellants may lose their right to a fair trial if confidential, privileged information and special knowledge which Olmsted was *in a position to acquire* while in public employment, is used on behalf of his new client." (Italics as in opinion.) (Appendix, p. 41.)

The violation of "fair play in litigation", the imminence of results stemming from "conduct prejudicial to the administration of justice" and the denial of the petitioners' "right to a fair trial" constitute an undeniable and substantial deprivation of the petitioners' constitutional rights respecting due process of law, as is evidenced by the declaratory statutes which have been violated.

Of necessity, in the words of Judge Conway,

> "the only proper way to insure a fair trial may be to disqualify an attorney with special and privileged information obtained through sanction of a statute while representing another client. • • •
>
> "The disqualification of an attorney in a particular proceeding has to do with the proper conduct of litigation before the court and is a *matter over which the court has inherent power.*" (Italics added.) (Appendix, pp. 41-43.)

A review by this Court on writ of certiorari is of compelling importance because it affects a case of an extremely

substantial character. The plant and property of the petitioner, Western New York Water Company, is valued at a sum in excess of twenty million dollars. The deprivation of a fair trial would result in a catastrophic loss to the petitioners and to the thousands of investors in its securities. The federal question involved is clearly expressed in both the prevailing and dissenting opinions of the Court of Appeals of the State of New York. The fact that the decision of the said Court of Appeals was by a four to three vote of the members of the said court should, in and of itself, in a matter of this importance, be sufficient to demonstrate the merit of this application.

Even apart from the magnitude of the amounts involved, however, a review by this Court on writ of certiorari is of extreme importance insofar as the disposition of the question herein involves a problem urgently in need of *judicial* attention. This case affects the relationship of government and its employees. Government employees frequently come into possession of confidential data in the course of their employment. Many of such employees have subsequently misused such information for their own financial benefit and to the detriment either of the government itself or of third parties whose affairs they have investigated as government employees. (In the instant case, for example, Olmsted jumped from an annual salary of $10,000. with the Public Service Commission to an annual salary of $24,000. with the Authority.) This is a problem which is constantly recurring at all levels of government, local, state and federal.

The most recent of such cases, and illustrative of a situation which has become common, is *Herman v. Acheson* (District Court for the District of Columbia, Index No. 3772-1952), where an attorney, in a situation similar to the

instant case, was barred from appearing before the International Claims Commission. So common has this problem become that even the press has become cynical. In the lead editorial in the New York World Telegram and Sun of September 4, 1952, under the heading, "It's all of a Pattern," it was said:

> "But after he quit his federal job, Mr. Herman used this 'confidential' list—and other inside information accumulated while the taxpayers were providing his livelihood—to hustle up a brisk private law practice in the field of international claims.
>
> "What Mr. Herman did was use his government job to promote his personal fortunes. So the Claims Commission has banned him for being 'unethical.'
>
> • • •
>
> "But that was only one story. Sam Herman is no isolated case. • • •
>
> "Nothing unusual about Mr. Herman at all. Except that he did get caught and was barred."

Attempts have been made to deal with the problem by legislative enactments. (See, for example, H. R. 405 which was introduced in the House of Representatives at the 1st Session of the 82nd Congress on January 3, 1951.) Despite such well-intentioned, futile attempts legislatively to solve the problem the government has been periodically rocked by scandals resulting not from the criminal activities of former employees (since such activities can easily be handled under existing laws) but from the activities of such former employees in the penumbral zone of matters which are inherently of such character as to be reprehensible. The relationship of former government employees to the government and to those whose affairs have come under their official scrutiny is urgently in need of clearer definition. This Court has an opportunity in this case to define or cause to be defined with exactitude the reciprocal rights and obligations which arise from the

relationship referred to relative to the administration of justice and to define the extent to which the application or non-application by the courts of the principles involved herein comes within the due process clause of the federal constitution.

Review by this Court on writ of certiorari is further required because it is apparent from the record herein that on the hearing before the County Court on the objections involved herein the said County Court so far departed from the traditional course of judicial proceedings, (and by failing to reverse by reason thereof, the Court of Appeals sanctioned such departure), that said hearing, in and of itself, constituted a violation of due process and calls for the exercise of this Court's power of supervision.

The petitioners herein throughout the aforesaid hearing sought to examine Olmsted and demanded that he take the stand (R. 27, 28, 29, 43). He refused to do so (R. 27) and the County Court refused to direct him to do so (R. 28, 43-44, 61). No claim of privilege was made by Olmsted. Instead of testifying, the Court permitted Olmsted to make an unsworn statement (R. 43-55, 60, 62) and refused to permit cross-examination (R. 61, 62). Obviously, this hearing was one in name only. It was completely inadequate for the purpose intended and deprived the petitioners of the opportunity fully and properly to present their case. It must be remembered that the evidence sought to be adduced concerned matters which were peculiarly within the knowledge of Olmsted. Although he would have been a hostile witness, petitioners had no alternative but to call him to the stand. His refusal to testify and the Court's failure to compel him to take the stand made a mockery of the hearing and deprived the petitioners of due process of law. Clearly, this is a case for the proper exercise of this Court's supervisory powers.

The principle of due process is one of the basic and fundamental rights of all persons living under the system of the common law. It is the very essence of the political concept upon which our government is erected, that we are a government of laws and not of men. It was, perhaps, best epitomized by the immortal Daniel Webster, one of the leading constitutional lawyers of all times, when he defined it in the celebrated case of *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, as follows:

> "By the law of the land is most clearly intended the general law; a law, which hears before it condemns; *which proceeds upon inquiry*, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society." (Italics added.)

The elements of due process "are such as the court of reason and conscience would sanction as the very A, B, C, of simple and substantial justice. All Constitutions and laws known to us Americans must be interpreted and applied with due regard for this cornerstone of every commonwealth." *(State ex rel. Hoel v. Brown*, 105 Ohio St., 479, 138 N. E. 230.)

"Due process of law" is a phrase which is not easy to define. This Court has many times said that it is wiser to leave the meaning to be evolved "by the gradual process of judicial inclusion and exclusion." (*Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616.) However, implicit in all decisions which turn upon the application of this primary and paramount principle is the essential element of "fairness" which must pervade the proceeding. As was said by Mr. Justice Roberts in *Lisenba v. California*. (1941), 314 U. S. 219, 238, 86 L. Ed. 166, 62 S. Ct. 280:

> "In such a case, we accept the determination of the triers of fact, unless it is so lacking in support in the

evidence that *to give it effect would work that fundamental unfairness which is at war with due process.*" (Italics added.)

Regard is mandatorily required to the conditions under which a trial is held to the end that persons be not deprived "of their right to a fair trial." The result of a trial which is unfair by reason of such conditions does "not meet any civilized conception of due process of law." (Concurring opinion of Mr. Justice Jackson, concurred in by Frankfurter, J., in *Shepherd v. Florida,* (1951), 341 U. S. 50, 95 L. Ed. 740, 71 S. Ct. 549)

In fine, petitioners throughout the proceedings in the courts below have objected to Olmsted's participation as a direct violation of the "due process" provision of the constitution as evidenced by his violation of Canon 36 and of Section 15 of the Public Service Law, which are statutory codifications declaratory of the constitutional provision. Further, objection was made to such participation by Olmsted as a violation of the principle of "fair play in litigation." The prevailing opinion of the New York Court of Appeals has characterized the charge as one of "conduct that was prejudicial to the administration of justice." The dissenting opinion stated that the petitioners "may lose their right to a fair trial." This Court has stated that lack of fairness "is at war with due process" and that deprivation of the "right to a fair trial" is opposed to "any civilized concept of due process of law."

VI

Summary of the Argument

A.

The appearance of Olmsted as special counsel for the Authority constitutes a deprivation of petitioners' rights to due process of law, as evidenced by his violation of Canon 36 of the Canons of Professional Ethics of the American Bar Association, (adopted in New York as rules of conduct for attorneys in state courts, McKinney's Judiciary Law, pp. 764 *et seq.*) which is a specific codification of the constitutional provision respecting due process of law.

B.

The appearance of Olmsted as special counsel for the Authority constitutes a deprivation of petitioners' rights to due process of law, as evidenced by his violation of Section 15 of the Public Service Law of the State of New York, which is a specific codification of the constitutional provision respecting due process of law.

C.

The proceeding herein did not involve the disciplining of Olmsted either by way of censure, suspension or disbarment, but involved rather the disqualification of Olmsted to appear as counsel for the Authority in the pending condemnation of the plant and property of the petitioner, Western New York Water Company. The County Court of Erie County (the court of original jurisdiction) has the power to determine such matter as an essential ingredient of its inherent control of litigation over which it has conceded jurisdiction.

D.

The denial by the Court of Appeals of the State of New York of the inherent jurisdiction of the County Court to pass upon the merits of the controversy involved herein results in a situation which is "prejudicial to the administration of justice," violates the principle of "fair play in litigation," deprives the petitioners of their "right to a fair trial," and thus constitutes an undeniable and substantial deprivation of the petitioners' constitutional rights respecting due process of law.

VII

Argument

A.

The appearance of Olmsted as special counsel for the Authority constitutes a deprivation of petitioners' rights to due process of law, as evidenced by his violation of Canon 36 of the Canons of Professional Ethics of the American Bar Association.

The Canons of Professional Ethics of the American Bar Association have been adopted in New York State as rules of conduct for attorneys. (McKinney's Judiciary Law, pp. 764, *et seq.)*

Insofar as pertinent, Canon 36 reads as follows:

> "A lawyer, having once held public office or having been in the public employ, should not, after his retirement, accept employment in connection with any matter which he had investigated or passed upon while in such office or employ."

Canon 36 is a declaration of the public policy relative to the misuse or potential misuse by lawyers of information which they obtained or were in a position to obtain while in the public employ. It emphasizes and codifies an essen-

tially fundamental concept of fair play in litigation and is calculated to prevent the attainment of an unfair and illegal advantage on the part of one party over another.

The critical test, under Canon 36, is whether Olmsted had the *opportunity* to acquire information concerning the Company. Proof of *actual* knowledge, while relevant, is not required. This point was well expressed in the dissenting opinion of Judge Conway of the Court of Appeals as follows: (See appendix herein, p. 41)

> "Once the condemnation proceeding goes to trial the appellants may lose their rights to a fair trial if confidential, privileged information and special knowledge which Olmsted was *in a position to acquire* while in public employment, is used on behalf of his new client." (Italics as in opinion.)

See, also, Opinion 134 (March 15, 1935), p. 283 *et seq.* of the Opinions of the Committee on Professional Ethics and Grievances of the American Bar Association, (published in 1947) wherein the applicability of Canon 36 was considered. The question propounded was as follows:

> "May an attorney, formerly employed by a State's Attorney's office, defend cases that originated while he was connected with that office?"

The Committee was careful to point out that the attorney had no personal connection with the case in question other than the fact that he was a member of the State Attorney's staff during the pendency thereof. The Committee said:

> "If he *actually* acquired such information, *manifestly* he could not properly use it." (Italics added.)

The Committee went on to say:

> "Even if he did not so acquire it, the public would naturally infer that he was retained by the defendant that some advantage in the defense of the case might derive from his former connection with the prosecutor's office.

"A lawyer retiring from public employ cannot utilize or *seem to utilize* the fruits of the former professional relationships in subsequent private practice involving a matter investigated or passed upon either by himself *or others of the public legal staff* during the time he was identified with it." (Italics added.)

See, also:

Opinion 37 of the Committee on Professional Ethics and Grievances of the American Bar Association (May 4, 1931), p. 123;

Porter, Price Administrator v. Huber (Dist. Ct. W. D. Wash. S. D. 1946) 68 F. Supp. 132.

In the case last cited, at page 135 the Court said that the acceptance of a retainer by former attorneys of an O. P. A. agency was

"contrary to the standards of professional ethics and inconsistent with public policy.

"It must be concluded that these attorneys, in participating in this suit, are at least inadvertently unprofessional, if not intentionally so. *This does not alter the fact that it is a real impropriety for them to appear in this cause,* and it is, therefore, the order of this Court that their names be stricken as counsel for the defendants." (Italics added.)

B.

The appearance of Olmsted as special counsel for the Authority constitutes a deprivation of petitioners' rights to due process of law, as evidenced by his violation of Section 15 of the Public Service Law of the State of New York.

In order to facilitate the proper operation of the government in functions which have been constitutionally and statutorily delegated to it, and in order to expedite the transmission of full, complete and accurate information and reports for such purposes, it has often been deemed necessary to cloak such information in a legal privilege so as to

protect the source of such information from the unfair advantage which would follow from the use thereof in private litigation.

Wigmore has very well expressed this point in one of his chapters on "Privilege" in his work on Evidence. (3rd Ed., Vol. 8.) In Section 2377, at page 761 he wrote:

> "Where the government needs information for the conduct of its functions and the persons possessing the information need the encouragement of privacy in order to be induced freely to make disclosure, the protection of a privilege should be accorded. • • • And where the ultimate purpose to be served is *administrative,* and not penal, it may well be that the Government can afford to promise secrecy in respect to purposes penal or litigious, as the price of readily achieving its administrative purpose when it demands a report of the truth.
>
> "It is some such principle that justifies the modern creation of a number of privileges, all statutory in origin, covering sundry *matters required by law to be reported to some administrative official.*" (Italics as in text.)

And at pages 764-768 Wigmore continues as follows:

> "The most apt instance of this principle is the principle established in most jurisdictions for *reports* of *commercial and industrial facts* required by law to be made by employers of various sorts or by commercial houses, or by public utilities, to the appropriate administrative official. • • • Here the main object is to investigate conditions and causes with a view to future administrative action; hence, the State can afford to abdicate the use of such reports for purposes of punishment or of private litigation." (Italics as in text.)

Wigmore goes on to say (pp. 769-771) that the statutory measures used to give effect to this privilege are these:

(a) Privacy for reports required to be filed by a party to the transactions:

(b) Prohibition to any official to disclose information thus obtained or any confidential finding placed on file;
(c) Prohibition of the use in civil or penal litigation of any testimony given at an administrative hearing.

In New York State, with relation to the matters involved herein, the legislature has followed the second of Wigmore's category of measures used. The pertinent portion of Section 15 of the Public Service Law reads as follows:

> "Any employee or agent of the commission who divulges any fact or information which may come to his knowledge during the course of any inspection or examination of the property, accounts, records or memoranda of any person, corporation or municipality subject to the jurisdiction of the commission, except in so far as he may be directed by the commission, or by a court or judge, or authorized by law, shall be guilty of a misdemeanor."

Wigmore's text amply states the rationale of Section 15. It is clear beyond question of doubt that the primary beneficiary of the privilege is the public utility with respect to which the information is obtained. In any event, it is important in this connection to note that the interests of the Commission and the interests of the utilities are not antagonistic and hostile to each other and that it is the duty and obligation of the Commission to protect the utilities as well as the public.

A particularly apt summary of the principle involved is set forth by the Supreme Court of Indiana in *Re Northwestern Indiana Telephone Company, et al.*, (1930), 201 Ind. 667, 171 N. E. 65, PUR, 1930 D, 143, 147:

> "The work of the Commission is that of regulation between the public and the public utilities operating in this state. In matters over which the Commission has jurisdiction, the public, in the initiative steps, should be treated as one party and the utility as the other.

We repeatedly hear the expression that it is the duty of the Commission to represent the public alone. *If, by this remark, it is meant that the Commission is organized but for one purpose, that of antagonistic action toward utilities under any and all circumstances, then one of the great purposes of the law, adequate service by the utility at the least cost to the consumer, might be entirely defeated.* The theory of the law creating the Commission is that it shall be conscientiously and impartially administered by a body composed of a personnel especially qualified by knowledge, training, and experience pertaining to the subject matter committed to it for award consonant with reasonable fairness and substantial justice according to legislative mandate, and the circumstances shown relative to its effect in the future on the utility's ability to serve the interest and convenience of the public; the cost and expense to the parties interested being an element for consideration." (Italics added.)

In New York it has been judicially stated that the legislative intention in the creation of the Public Service Commission is not limited to protection of the public, but extends to the protection of utility corporations and their stockholders. See *Public Service Commission v. New York & Richmond Gas Co.*, (App. Div., 3rd Dep't., 1935) 244 App. Div. 398, 401, 279 N. Y. Supp. 824, where the Court stated:

"Unquestionably it was the legislative intention in granting to the Commission extensive powers of regulation and supervision *to protect not only utility corporations* and their stock holders but primarily the investing public." (Italics added.)

If there remains any doubt as to the relationship of the New York Public Service Commission to public utilities and their investors, reference may be had to the Annual Report of the New York Public Service Commission for the year 1951 where it is said at page 120:

"Our Commission has a three-way responsibility in respect of each utility under its jurisdiction: to the

> utility itself, to the investors in that utility and to the consuming public. The interests of all are interlocking and are not necessarily conflicting."

It remains only to note that Section 15 does not and cannot apply merely to a person currently employed. Such an interpretation would abort its effectiveness, for the privileged matters protected by the statute could be divulged and the purpose of the statute flouted by any agent or employee of the Commission who saw fit to resign and reveal his information. No material is privileged if an individual can unilaterally release himself from a limitation by voluntarily withdrawing from the relationship which created the limitation.

C.

The County Court of Erie County had authority to rule on the propriety of Olmsted's appearance before it.

The issue in this proceeding involves neither censure, suspension nor removal from office. It has nothing to do with disciplinary proceedings. The issue involves *disqualification in a particular matter*, or more particularly, the inherent authority of any court to control the conduct of litigation before it, to regulate the activities of its officers, including attorneys-at-law, and to bar the appearance of an attorney-at-law in a pending cause where the facts so warrant or demand.

In the dissenting opinion of the Court of Appeals in this case, Judge Conway said: (See appendix herein, pp. 39-40)

> "Clearly, the disqualification of an attorney in a particular matter does not constitute a censure for a censure is a formal and direct reprimand. Disqualification is not to be characterized as a censure or as an action of a disciplinary nature and hence within the jurisdiction solely of the Appellate Division for the

reason that it may be regarded by some persons as reflecting upon the professional behavior of the attorney whose appearance has been barred. * * *

"Neither, does a disqualification amount to a suspension or removal * * *. Thus the suspension or removal of an attorney pursuant to Section 90 Subd. 2 (of the Judiciary Law of New York) operates as a suspension or removal *in every court* in the state and the attorney is barred from practicing law *anywhere in any form* either for the period of time that he is suspended or permanently if he be removed. Thus it is evident that a proceeding brought under Section 90 is *directly* and not incidentally concerned with the fitness of an attorney to practice his profession. No question is raised here as to the fitness of Olmsted to continue to practice his profession—neither censure, suspension nor disbarment is sought. All that respondent (appellant) seeks here is disqualification in this one case." (Italics added.)

That the courts have such inherent power, authority and duty, entirely apart from disciplinary action, is amply supported by the authorities.

7 Corpus Juris Secundum 730 and 827,

Brown v. Miller, (C. C. A.—D. C., 1923) 286 Fed. 994, and cases cited;

Porter, Price Administrator v. Huber, (Dist. Ct.—W. D. Wash. S. D., 1946) 68 F. Supp. 132;

Watson v. Watson, 171 Misc. 175, 11 N. Y. S. 2d 537, and cases cited;

Packer v. Rapaport, (1949) 88 N. Y. S. 2d 118, reversed on other grounds 275 App. Div. 820, 89 N. Y. S. 2d 703;

Matter of H, an attorney, (1882) 87 N. Y. 521;

Leviten v. Sandbank, (1943) 291 N. Y. 352, 357, 52 N. E. 2d 898.

Referring again to the dissenting opinion of Judge Conway (See appendix herein, pp. 40-43) we find the following statement:

"The distinction between a formal disciplinary proceeding and the action of a court *in the exercise of its inherent authority* to regulate the activities of its officers and to forbid the appearance of an attorney in an action pending before a court of record has been recognized in *Brown v. Miller*, 286 Fed. 994, 997, where it was sought to bar an attorney from appearing in a particular matter.

"Courts in this state and other states have acted upon the basis of *their inherent authority* to forbid the appearance of an attorney in a particular case where the facts warranted it (Citing cases).

• • •

"The disqualification of an attorney in a particular proceeding has to do with the proper conduct of litigation before the court and is a matter over which the court has inherent power." (Italics added).

The relationship of Section 90 of the Judiciary Law of the State of New York (governing disciplinary proceedings, as such, before the Appellate Division of the Supreme Court) to the application herein to disqualify Olmsted in this proceeding is analogous to the relationship of the right of the People to prosecute by reason of a penal offense to the cause of action based upon a civil wrong arising from the same facts. Certainly, that a given set of facts constitute a crime has never been held to bar a cause of action sounding in tort and arising from the same facts. By parity of reasoning, that Olmsted may be susceptible to disciplinary proceedings by reason of the facts herein, cannot militate against the private right of the petitioners herein to press for his disqualification herein upon the same facts.

D.

The denial by the Court of Appeals of New York of the inherent jurisdiction of the County Court to pass upon the merits of the controversy involved herein results in a substantial deprivation of the petitioners' constitutional rights respecting due process of law.

The petitioners herein have attacked the participation of Olmsted herein on behalf of the Authority as a deprivation of their right to due process of law, as evidenced by the violation of Canon 36, of Section 15 of the Public Service Law, and of the principle of "fair play in litigation." The prevailing opinion of the Court of Appeals has characterized the contention of the petitioners as a charge that Olmsted was guilty of "conduct that was prejudicial to the administration of justice." And Judge Conway, in the dissenting opinion of the Court of Appeals, has stated that the participation of Olmsted may result in a loss to the petitioners of "their right to a fair trial." All of the foregoing expressions are simply alternative methods of stating the basic concept of due process of law. The canon and section referred to, as heretofore stated, are statutory codifications declaratory of the constitutional provision for due process.

The judiciary, like the other branches of government, is duty bound to observe the requirements of due process. Thus, in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* (1930), 281 U. S. 673, 680, 74 L. Ed. 1107, 50 S. Ct. 451, it was said:

> "The violation (of the due process clause of the 14th Amendment) is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (First Nat. Bank v. Weld County, 264 U. S. 450, 68 L. Ed. 784, 44 Sup. Ct. Rep. 385) state statute. The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive or administrative branch of government."

At page 682 this Court considered the standards which must be observed by the judiciary in order properly to observe the requirements of due process of law. The Court said:

> "While it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

In considering the effect of a failure to obtain a fair trial or hearing it was said in *Roberts v. Anderson,* (C. C. A., 10th Cir., 1933), 66 F. 2d 874, 876:

> "Where the rights of a citizen depend upon the ascertainment of facts, due process of law requires that he be notified of the hearing and be afforded an opportunity to be heard. • • • In *McVeigh v. United States,* 11 Wall. 259, 267, 20 L. Ed. 80, it was said that 'A different result would be a blot upon our jurisprudence and civilization' • • • In *Atchison, etc., Ry. Co. v. United States,* 284 U. S. 248, 52 S. Ct. 146, 150, 76 L. Ed. 273, it was held that 'a fair hearing is a fundamental requirement' • • •. In *Int. Com. Com. v. Louis. & Nash. R. R.,* 227 U. S. 88, 91, 33 S. Ct. 185, 186, 57 L. Ed. 431, it was held that 'administrative orders, quasi-judicial in character, are void if a hearing was denied; *if that granted was inadequate or manifestly unfair.*'" (Italics added).

Similarly, where the hearing is conducted in such fashion as to violate the principle of "fair play in litigation" it has come within the proscription of this Court as a violation of due process. In *Ohio Bell Teleph. Co. v. Public Utilities Com.,* (1937), 301 U. S. 292, 304, 305, 81 L. Ed. 1093, 57 S. Ct. 724 it was said:

"All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 73, 80 L. Ed. 1033, 1052, 56 S. Ct. 720) of a fair and open hearing be maintained in its integrity. *Morgan v. United States,* 298 U. S. 468, 480, 481, 80 L. Ed. 1288, 1294, 1295, 56 S. Ct. 906; *Interstate Commerce Commission v. Louisville & N. R. Co.,* 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185, *supra. The right to such a hearing is one of 'the rudiments of fair play' (Chicago, M. & St. P. R. Co. v. Polt,* 232 U. S. 165, 168, 58 L. Ed. 554, 555, 34 S. Ct. 301) *assured to every litigant by the Fourteenth Amendment as a minimal requirement.* (Citing cases) There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." (Italics added).

Clearly expressing the principle involved herein is the opinion of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Com. v. McGrath,* (1951), 341 U. S. 123, 95 L. Ed. 817, 71 S. Ct. 624, in which, at page 161, it is said:

"*Fairness of procedure is 'due process in the primary sense.'* Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 681, 74 L. Ed. 1107, 1114, 50 S. Ct. 451. It is ingrained in our national traditions and is designed to maintain them. In a variety of situations the Court has enforced this requirement by checking attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of *fair play* enshrined in the Constitution." (Italics added).

And at pages 165 and 166 Mr. Justice Frankfurter said:

"From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning. (Citing cases) *Fair hearings have been held essential* for rate determinations and, generally, *to deprive persons of property.*" (Italics added).

Conclusion

Petitioners therefore urge that the writ prayed for herein be issued; that the decision of the Court of Appeals of the State of New York be reviewed by this Court and its judgment reversed with such directions as to the Court may seem just and proper.

Dated: October 7, 1952.

Respectfully submitted,

REID S. MOULE, and
JESSE CLIMENKO,
Attorneys for Petitioners.

REID S. MOULE,
Buffalo, N. Y.

JULIUS L. SACKMAN,
New York, N. Y.

Of Counsel.

DARK PAGE BLEED THRU

APPENDIX

COURT OF APPEALS

ERIE COUNTY WATER AUTHORITY,
Respondent,

against

WESTERN NEW YORK WATER COMPANY *et al.*,
Appellants, et al., Defendants.

LOUGHRAN, CH. J.:

This condemnation proceeding was instituted in the County Court of Erie County by the plaintiff Erie County Water Authority to acquire property rights of the defendants Western New York Water Company and New York Water Service Corporation. When the issues came on to be heard, counsel for the defendant companies orally moved the County Court for an order prohibiting Laurence J. Olmsted, a member of the profession of the Bar in this State, from appearing in the proceeding as counsel for the plaintiff water authority.

In 1936, Mr. Olmsted had entered the employ of the Public Service Commission of this State as an attorney at law and several years later had been advanced to the rank of assistant counsel to the Commission, a position which he occupied until May 16, 1951, when he resigned and accepted employment as counsel for the plaintiff water authority. When the defendant companies challenged the propriety

of the appearance of Mr. Olmsted herein, he entered a special appearance, denied the power of the County Court to determine the charge made against him by the defendant companies and insisted that exclusive jurisdiction to dispose of such an accusation was conferred by section 90 of the Judiciary Law upon the Appellate Division of the New York Supreme Court. The County Court, however, assumed jurisdiction of the motion made against Mr. Olmsted by the defendant companies and, after hearing, denied that motion in an opinion which reads in part as follows:

"Did Olmsted investigate or pass upon this matter while acting as attorney for the Public Service Commission?

"The facts disclose that he had appeared for the Commission in 1941 in hearings relative to the Western New York Water Company's compliance with orders of the Commission, and from 1947 to 1949 in connection with a rate case involving the Water Company. He also appeared as a spectator in various hearings of like nature involving the Water Company. * * *

"Olmsted had never appeared in this proceeding or any other related thereto prior to his employment by the plaintiff. He has never appeared for or on behalf of the Western New York Water Company in any manner. His former employer the Public Service Commission is not a party to and is not interested in this condemnation action."

In accordance with its views as so expressed, the County Court made an order which (1) denied the oral motion whereby the defendant companies sought to bar appearance herein by Mr. Olmsted as counsel for the plaintiff water authority, and (2) granted leave to Mr. Olmsted to appear herein as trial counsel and as attorney for the plaintiff water authority.

From that order of the County Court the defendant companies appealed to the Appellate Division where that order was affirmed on the sole ground that the County Court had no jurisdiction to grant the motion made by the defendant companies against Mr. Olmsted. All the justices of the Appellate Division were of the opinion that the County Court was without jurisdiction of that motion. One Justice, however dissented and voted for reversal of the order of the County Court, and dismissal of the motion upon these grounds: (1) The County Court was without jurisdiction to entertain the motion or to grant the relief therein sought; (2) the order of the County Court was a nullity; (3) the objection made by Mr. Olmsted to the jurisdiction of the County Court should have been sustained.

On an appeal by the defendant companies from the order of the Appellate Division, the case is now properly here (*Erie County Water Authority v. Western New York Water Company et al.*, 303 N. Y. 908. See Powers of the New York Court of Appeals, Revised Edition by Cohen and Karger, § 45, pp. 181-183).

In the brief submitted to us in behalf of the defendant companies, their counsel says: "The issue in this proceeding involves neither censure or suspension • • •. The issue involves disqualification in a particular matter, or more particularly, the inherent power of all courts • • • to bar the appearance of an attorney-at-law in a pending cause where the facts so warrant or demand." This assertion, we think, has no warrant in the record.

In the County Court counsel for the defendant companies accused Mr. Olmsted of violating Canon 36 of the Canons of Professional Ethics of the American Bar Association by accepting employment with the plaintiff water authority

in connection with matters which he had investigated or passed upon in the course of his employment as an attorney at law for the New York Public Service Commission. At the same time, counsel for the defendant companies also accused Mr. Olmsted of a violation of section 15 of the New York Public Service Law by making unauthorized disclosures of information which had come to his knowledge when, as an employee of the New York Public Service Commission, he was examining records of the defendant companies.

In short, counsel for the defendant companies at the hearing herein charged Mr. Olmsted with professional misconduct and conduct that was prejudicial to the administration of justice. If the County Court had "disqualified" Mr. Olmsted upon the basis of that charge, as the defendant companies requested, then the action of the County Court would have been nothing more than a futile attempt to exercise a jurisdiction which had not been committed to that court.

The members of the profession of the Bar in this State are officers of the New York Supreme Court and the Appellate Division of that court has exclusive jurisdiction to say what constitutes professional misconduct on their part (Judiciary Law, § 90, subd. 2; see *People ex rel. Karlin v. Culkin*, 248 N. Y. 465). Moreover, the punishment that is to follow must be determined by the Appellate Division and is not subject to revision even in this court (*Matter of Axtell*, 257 N. Y. 210).

The order of the Appellate Division should be affirmed, with costs.

Order affirmed.

CONWAY, *J.*, (dissenting)

The defendants-appellants, Western New York Water Company, and its parent company, New York Water Service Corporation, moved in the Erie County Court to bar the appearance of one Olmsted as trial counsel for plaintiff, Erie County Water Authority, (hereinafter called the Authority), in a proceeding to condemn the water plant and property of the Western New York Water Company (hereinafter called the Company). The proceeding was instituted by the Authority to acquire the properties of the Company and Olmsted was engaged as trial counsel on May 16, 1951, the same day on which he resigned as Principal Attorney and Assistant Counsel to the Public Service Commission. He had been employed continuously as an attorney with the Public Service Commission from the year 1936 to May 16, 1951. During the period from 1947 until his resignation from the Public Service Commission, he had handled proceedings for the Commission in which the Company was a party. The Commission had investigated and passed upon the propriety of the Company's rates and charges and the adequacy of the Company's facilities and service during that period. In February, 1951, prior to the commencement of the condemnation proceeding the attorney for the Authority inquired of Olmsted whether he would be available to accept a retainer from the Authority in connection with the trial of the condemnation proceeding and whether he could obtain a leave of absence from the Commission for that purpose. That conversation was reported to the Chairman of the Commission and thereafter on April 6, 1951, the Authority made an application requesting that Olmsted be granted leave of absence. The application was accompanied by a resolution adopted by the Authority which recited that it would be "highly de-

sirable" for the Authority to engage the services of Olmsted as trial counsel provided a leave of absence were granted by the Commission, and that "it would be highly desirable and in the public interest, for the Authority to obtain any and all available knowledge and information with respect to the system, plants, properties, and operations and financial condition of the Western New York Company in the possession of the Public Service Commission." The resolution further provided that in view of Section 15 of the Public Service Law, the Authority requested the Commission to direct Olmsted "to divulge and disclose to the Water Authority, and to any court or commission having jurisdiction of such condemnation proceeding, any facts or information which may have come to * * * [his] knowledge during the course of any inspection or examination of the property, accounts, records or memoranda of the Western New York Water Company, while in the employ of the Public Service Commission". The Commission denied the Authority's request that Olmsted be granted an extended leave of absence and refused to waive Section 15 of the Public Service Law on the ground that "a blanket order granting access to all working papers in all pending and closed cases relating to said utility would cause serious administrative difficulties. It believes that the more desirable procedure would be for the Authority to request such specific working papers as it deems necessary for its use."[1]

Subsequently, on May 16th, 1951, Olmsted resigned his position with the Commission and commenced his employ-

[1] Section 15 of the Public Service Law insofar as pertinent provides:

"Any employee or agent of the commission who divulges any fact or information which may come to his knowledge during the course of any inspection or examination of the property, accounts, records or memoranda of any person, corporation or municipality subject to the jurisdiction of the commission, except insofar as he may be directed by the commission or by a court or judge, or authorized by law, shall be guilty of a misdemeanor."

ment with the Authority on the same day. Under the terms of the agreement Olmsted's employment was to be for a period of six months, at a salary of $2,000 a month, during which period he was to devote his full time to the condemnation proceeding. The agreement also provided that "should said Special Counsel [Olmsted] become disqualified to act as an employee of the Water Authority by reason of the provisions of the Public Service Law, then this contract shall be immediately terminated without further liability or responsibility to either of the parties hereto."

The Authority on August 7, 1951 filed with the Erie County Court its petition to condemn the property at which time the Company challenged Olmsted's right to appear for the Authority. The proceeding before the County Court was adjourned until August 15, 1951 when counsel for the Company again raised objections to Olmsted's appearance. The Company contended that the Authority employed Olmsted as counsel in order to obtain the benefits of his special knowledge and privileged information concerning the Company while in the employ of the Public Service Commission. The Company urged that Olmsted should be barred from appearing in the proceeding because of Canon 36 of the Canons of Professional Ethics of the American Bar Association[2] and Section 15 of the Public Service Law, *supra*, footnote 1.

Olmsted contended that all the information he possessed was a matter of public record, and that the Supreme Court and the Appellate Division had exclusive jurisdiction, by

[2] Canon 36 provides:
"A lawyer having once held public office or having been in the public employment, should not, after his retirement, accept employment in connection with any matter which he had investigated or passed upon while in such office or employ."

virtue of the provisions contained in Section 90, subd. 2 of the Judiciary Law, to determine whether or not he should be permitted to appear in the matter.[3] Whether or not the information possessed by Olmsted is a matter of public record has no relevancy when Canon 36 is under consideration (The Canons of Professional Ethics and Judicial Ethics of the American Bar Association, including Canon 36, have been adopted in this state as rules of conduct for attorneys in our courts. [McKinney's Judiciary Law, pp. 764 *et seq.*]). He was requested by counsel for Company to take the witness stand so that he might be interrogated and he refused to do so. The County Judge refused a request of Company for a direction that he do so saying: "I cannot request him to take the stand."

The trial judge ruled that "The County Court has jurisdiction to decide who is qualified to appear and who is disqualified to appear before the Court and I so hold". After a hearing the County Court denied the motion to bar Olmsted's appearance for the reason that Canon 36 of the Canons of Professional Ethics was not applicable since there was no identity of facts or subject matter in the matters handled by Olmsted for the Commission and to be

[3] Section 90, subd. 2 of the Judiciary Law reads as follows:

"2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law, admitted to practice as such who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

It shall be the duty of the appellate division to insert in each judgment, decree or final order of suspension or removal hereafter rendered a provision which shall command the attorney and counsellor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another. In addition it shall forbid the performance of any of the following acts for compensation or reward, to wit:

a. The appearance as an attorney or counsellor-at-law before any court, judge, justice, board, commission or other public authority. * * * "

presented by him in the condemnation proceeding. The Appellate Division, Fourth Department, affirmed the order of the County Court "on the sole ground that the Erie County Court had no jurisdiction to grant the relief sought." One Justice dissented and voted for a reversal of the order and dismissal of the proceeding "upon the ground that the court was without jurisdiction to entertain the matter or to grant the relief therein sought and upon the further ground that the order was a nullity." The majority of the Appellate Division has apparently held that the County Court had jurisdiction *to inquire into* the propriety of the appearance of Olmsted before it *but was without power to bar* his appearance.

Whether or not the County Court possessed jurisdiction to bar the appearance of Olmsted as attorney for the Authority in this litigation turns on whether or not the disqualification of an attorney in a particular matter is a disciplinary proceeding cognizable only by the Appellate Division under Section 90 subd. 2 of the Judiciary Law. That Section authorizes the Appellate Division in each department to "censure, suspend from practice or remove from office" any attorney "guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor or any other conduct prejudicial to the administration of Justice."

Clearly, the disqualification of an attorney in a particular matter does not constitute a censure for a censure is a formal and direct reprimand. Disqualification is not to be characterized as a censure or as an action of a disciplinary nature and hence within the jurisdiction solely of the Appellate Division for the reason that it may be regarded by some persons as reflecting upon the professional behavior of the attorney whose appearance has been barred. The

reproval, if any there be, is indirect and incidental. At times, courts, in the discharge of their duty to assure to parties before them a fair and orderly hearing, are compelled to direct remarks to attorneys which may reflect indirectly upon their professional conduct. It could not be seriously urged that the courts exceed their power in so doing.

Neither does a disqualification amount to a suspension or removal for in the event of a suspension or removal the order of the Appellate Division contains a direction to the attorney to refrain from the practice of law "in any form" and forbids his appearance as an attorney before "any court, judge, justice, board, commission or other public authority." Thus the suspension or removal of an attorney pursuant to Section 90 subd. 2 operates as a suspension or removal in every court in this state and the attorney is barred from practicing law anywhere in any form either for the period of time that he is suspended or permanently if he be removed. Thus it is evident that a proceeding brought under Section 90 is directly and not incidentally concerned with the fitness of an attorney to practice his profession. No question is raised here as to the fitness of Olmsted to continue to practice his profession—neither censure, suspension nor disbarment is sought. All that respondent seeks here is disqualification in this one case.

The distinction between a formal disciplinary proceeding and the action of a court in the exercise of its inherent authority to regulate the activities of its officers and to forbid the appearance of an attorney in an action pending before a court of record has been recognized in *Brown v. Miller*, 286 Fed. 994, 997, where it was sought to bar an attorney from appearing in a particular matter.

Courts in this state and other states have acted upon the basis of their inherent authority to forbid the appearance of an attorney in a particular case where the facts warranted it. (*Watson v. Watson*, 171 Misc. 175; *Brown v. Miller, supra; Porter, Price Admin. v. Huber*, 68 Fed. Supp. 132; see, also, *Packer v. Rapaport*, 88 N. Y. S. 2d 118, revd. on other grounds 275 App. Div. 820; *Weidekind v. County Water Co.*, 74 Cal. 386, 19 Pac. 173).

In the absence of statute, there could be no question of the power of the County Court to bar an attorney from appearing in the matter at hand. The rule is set forth in 7 C. J. S. 730 as follows:

> "Generally all courts of record have power in a proper case to suspend or annul the license of an attorney practicing in the particular court pronouncing sentence but the power to go further and make the suspension or revocation effective in all other courts must be conferred by statute."

The statute here, section 90, subd. 2 is concerned with the disciplining of an attorney who has already committed an act of misconduct. As yet Olmsted has not been charged with committing misconduct or impropriety. In barring him from appearing in this litigation the County Court might be preventing him from committing an act of misconduct for which he could be punished. Unless he has acted as attorney for the Authority there may be no basis for a disciplinary proceeding. Once the condemnation proceeding goes to trial the appellants may lose their right to a fair trial if confidential, privileged information and special knowledge which Olmsted was *in a position to acquire* while in public employment, is used on behalf of his new client. Hence, the only proper way to insure a fair trial may be to disqualify an attorney with special and privileged information obtained through sanction of a statute

while representing another client. No case has been called to our attention in this state where the question of whether an attorney should be barred from appearing in the litigation at hand was treated as a disciplinary matter solely to be dealt with by an appropriate petition to the Appellate Division. That brings us to the next point. The procedure provided for implementing section 90, subd. 2 is cumbersome and is aimed at investigation and punishment of an attorney for past conduct. By Rule 5 of the Rules relating to attorneys of the Rules of the Appellate Division, Fourth Department, a petition for investigation of the conduct of an attorney may be presented to the Appellate Division by any person claiming to be aggrieved. This is done through a notice of motion and provision is made in the statute for the service of a copy of the charge upon the attorney involved. The petitioner may have to wait until the commencement of a term of the Appellate Division in order to bring on a hearing as to the propriety of an appearance of an attorney in pending litigation. As we view it the disciplinary procedure set forth in Section 90 is a means of disciplining or punishing an attorney for acts of misconduct already committed, such as conversion of funds, ambulance chasing, fraud, bribery and the like. Where an attorney is disqualified in a particular case no charges are thereby preferred against him. Such action is taken to insure a fair trial without necessarily subjecting the attorney to the stigma of disciplinary action. The conduct of an attorney may be ill advised and inconsistent with public policy and the ethics of his profession but may not be of such a character as to necessitate the institution of disciplinary proceedings against him (See, *Porter v. Huber*, 68 Fed. Supp. 132).

The disqualification of an attorney in a particular proceeding has to do with the proper conduct of litigation

before the court and is a matter over which the court has inherent power. It is similar to the power to pass upon the qualification of a witness to take the stand or the power to punish for contempt committed in the presence of the court which power was inherent in our judicial system and possessed by courts prior to and apart from statute.

Likewise, "the courts by virtue of their inherent power and control over their own officers, and quite independent of specific statutory provision will under proper circumstances exercise jurisdiction and summarily compel an attorney to fulfill his obligations toward his client by paying money or delivering documents which belong to him * * *." *(Matter of Niagara, L. & O. Power Co.,* 203 N. Y. 493, 496-7 and cases cited therein. See *Matter of Long,* 287 N. Y. 449). Such action by the court is not disciplinary in nature even though the conduct of the attorney may be such as to warrant the institution of a disciplinary proceeding against him.

The case should be remitted to the Appellate Division to pass upon the question of whether Olmsted should be barred from appearing in this litigation.

Lewis, Fuld, Froessel, JJ., concur with Loughran, Ch. J.; Conway, J., dissents in opinion in which Desmond and Dye, JJ., concur.

Order affirmed.